

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2008

STATE OF TENNESSEE v. RENEE MYERS

**Direct Appeal from the Circuit Court for Unicoi County
No. 5555, 5571 Lynn W. Brown, Judge**

No. E2007-02151-CCA-R3-CD - Filed November 6, 2008

The defendant, Renee Myers, entered guilty pleas to two counts of facilitation of second degree murder, Class B felonies. In exchange for her guilty pleas, the defendant received consecutive sentences of ten years for a total effective sentence of twenty years. On appeal, the defendant argues that the trial court erred in denying any form of alternative sentencing and imposing confinement. Following our review of the record and the parties' briefs, we affirm the trial court's sentencing decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Gene G. Scott, Jr., Johnson City, Tennessee, for the appellant, Renee Myers.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Anthony Wade Clark, District Attorney General; and Mark K. Hill, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

On August 20, 2007, the defendant entered guilty pleas to two counts of facilitation of second degree murder, Class B felonies. In exchange for her guilty pleas, the defendant received consecutive sentences of ten years for a total effective sentence of twenty years with the manner of service to be later determined by the trial court. The presentence report, entered without objection at the sentencing hearing, summarizes the facts giving rise to the defendant's convictions.

According to a statement from the defendant, on or about 8-6-05, she did unlawfully distribute Methadone, a Schedule II narcotic, to Dustin Tittle, age 21. As a result of the unlawful distribution of the Schedule II narcotic by the defendant, Dustin Tittle

died of a drug overdose. According to Pathologist William F. McCormick . . . the death of Dustin Tittle was caused by a drug overdose consisting of Methadone and Benzodiazepines and was determined to be the proximate cause of death. . . .

. . . [O]n or about 9-10-05 the defendant did commit the offense of [murder] of Timothy McInturff by an unlawful distribution of Methadone . . . which proximately resulted in [his] death. . . .

At the sentencing hearing, the defendant testified that she was forty-four years old and that she had lived in Florida most of her life. She recounted that she had dropped out of high school after the eleventh grade and never obtained a GED. She started using marijuana when she was fifteen years old and continued using it until her arrest for the deaths of Tim McInturff and Dustin Tittle. At the age of sixteen, she began abusing painkillers, Lortab and Xanax. When she was twenty-six years old, she began to obtain these painkillers without a prescription. She then became addicted to heroin. The defendant recalled that she used heroin from age twenty-seven to age forty. In 1997, she went to a clinic and received a prescription for Methadone, which she continued to use until her arrest in 2005. She explained that she was prescribed Methadone to help break her addiction to heroin.

The defendant testified that she had a criminal record but said it consisted of non-violent offenses. She said that several of her prior convictions were for cashing forged checks for her ex-sister-in-law, who used the money to purchase drugs. The defendant also said that her criminal record was due to her drug addiction. She said that the longest she had ever spent in jail prior to her arrest for the instant offenses was 180 days. The defendant acknowledged that she had furnished drugs to people in the past other than the two victims in the instant case.

The defendant testified that she moved from Florida to Unicoi County, Tennessee, on August 1, 2005. Shortly thereafter, she met the victims, Tittle and McInturff. The defendant recalled that she gave forty milligrams of Methadone to Tittle in exchange for “some pot.” Likewise, she gave McInturff forty milligrams of Methadone after he told her that he was “dope sick.” The defendant acknowledged that Tittle died about a week after she moved to Unicoi County and on the same day she gave him the Methadone. The defendant further acknowledged that someone starting to use Methadone might not have the same tolerance for the drug as someone who had been on it for years.

Pam Williams testified that she began a Bible study in January of 2006 with the female inmates at the Unicoi County Jail. Williams said that when the defendant first began to attend the Bible study, she was “very bitter” about her circumstances. However, the defendant’s heart began to soften and she had expressed remorse for her actions.

Investigator Reagan Tilson with the Erwin Police Department testified that in September of 2005, he interviewed the defendant regarding her involvement in the death of McInturff. Investigator Tilson stated that during the interview the defendant did not show remorse because she told him that “she couldn’t get in trouble for . . . giving drugs away.”

Terri Miller testified that she was the older sister of Tim McInturff. Miller recalled three encounters she had with the defendant before her brother died. Miller recounted that on September 8, 2005, she went over to her parent's house to wish her brother a happy thirtieth birthday. When she arrived, she was introduced to the defendant. According to Miller, the "first words out of [the defendant's] mouth was, do you take Lortab." Miller replied that she did not take Lortab and the defendant immediately asked her if she took Xanax or smoked pot, to which Miller told the defendant that she did not take those drugs. The next day, Miller saw the defendant going into Miller's parent's house. At this time, the defendant told Miller, "I've got to go take Timmy something, he's hurting. He[] went to physical therapy and they didn't give him anything for pain" Miller responded, "[Y]ou better not take my brother anything." However, the defendant ignored her. Miller explained that the next day her brother died. The defendant came over to the house again and put on "this boo-hoo act." Miller took the defendant outside and asked the defendant what she gave her brother. The defendant admitted to Miller that she had given McInturff Methadone and Lortab. Miller then told the defendant that she had killed her brother. Miller told the court that her family need closure and asked for justice.

Tammy Hensly, another sister of Tim McInturff, testified that her brother had never been prescribed Methadone. She recalled that she saw her brother after he came home from physical therapy and "he was not in bad pain." Hensly then gave the following statement to the court:

[T]he hurt is still as strong today as it was two years ago. And [the defendant] shouldn't have probation because if she gets out she'll probably kill somebody else. . . . And I know thirty-four days between Dustin Tittle's death, and my brother's death she's bound to have known what she did to Dustin Tittle, and then she done the same thing to my brother. She took a father away from his two children. One has to go in therapy because he can't get over his father's death.

Glenda Gillis testified that she was Dustin Tittle's aunt and that she helped raise him "[f]rom the time he was born." Gillis stated:

Dustin was my life. He was raised in a home that was hard on him. They was into drugs and things. And I tried to show him a good life. Dustin was a good boy if he'd had the chance. But, I was coming home from South Carolina on vacation, and I saw him before I left, and hugged him, and told him bye, I'd see him when I got back. When I got back my son had called and said [Dustin] passed away. . . . I just want justice served. I'd like to see her not get probation

At the conclusion of the sentencing hearing, the trial court found that the defendant had a criminal history including seven prior felony convictions. The court found that the defendant had a poor social history as reflected by her repeated drug use and an inconsistent employment history. The court also found that the defendant's potential for rehabilitation was poor in that "she had probation time and time again, and it's not worked." The court further noted that "confinement was necessary to avoid depreciating the seriousness of the offenses in which these two young men died." The court stated that the defendant had "the burden of showing that she's entitled to . . . alternative sentencing. She hasn't come close. Looking at all these factors every single factor . . . weighs

against her, and some of them quite strongly.” The court then denied alternative sentencing and ordered the defendant to serve her ten-year-sentences in confinement. The defendant appealed.

ANALYSIS

The defendant’s sole issue on appeal is whether the trial court erred in denying alternative sentencing and imposing full confinement. The defendant submits that she is amenable to rehabilitation because her criminal record consists of non-violent crimes and she did not intend to cause the deaths of Tittle and McInturff.

When a defendant challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentencing decision was improper. *Id.* § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if: (1) the sentence complies with our sentencing statutes, and (2) the trial court’s findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210.

Generally, considerations relevant to determining a defendant’s eligibility for alternative sentencing are relevant to determining suitability for probation. *See Ashby*, 823 S.W.2d at 169. A defendant is eligible for probation if the actual sentence imposed is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. Tenn. Code Ann. § 40-35-303(a). Also, a defendant should be considered a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. *Id.* § 40-35-102(6). However, the defendant bears the burden of proving suitability for probation. Tenn. Code Ann. § 40-35-303(b). Among the factors applicable to a probation consideration are the circumstances of the offense, the defendant’s criminal record, social history and present condition, the deterrent effect upon the defendant, and the best interests of the defendant and the public. *See State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

Guidance as to whether the trial court should grant alternative sentencing or incarcerate is found in Tennessee Code Annotated section 40-35-103. Sentences involving confinement should be based upon the following considerations:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .

Tenn. Code Ann. § 40-35-103. As part of its determination, the trial court may also consider the defendant's potential or lack of potential for rehabilitation. *Id.* § 40-35-103(5). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. *Id.* § 40-35-103(2); *State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

While eligible for probation, the defendant was not a favorable candidate for alternative sentencing because she was convicted of a Class B felony. The record reflects that the trial court took into consideration the defendant's criminal record, the defendant's past failures with probation, and the serious consequences which occurred as a result of the offenses committed by the defendant. According to the defendant's presentence report, she had multiple convictions for forgery, drug possession, knowingly issuing worthless checks, and various traffic offenses. She also violated her probation on several occasions. The defendant's social history reflects repeated use of marijuana, Lortab, Xanax, heroin, and Methadone. Also, the testimony at the sentencing hearing reveals that the defendant's actions in furnishing Methadone to two young men caused their deaths and caused their families pain and suffering. Given that the court's findings are adequately supported by the record, and the defendant's sentence complies with our sentencing statutes, we discern no abuse of discretion in the court's sentence of confinement. Accordingly, the defendant is not entitled to relief.

CONCLUSION

In accordance with the aforementioned reasoning and authorities, we affirm the judgments of the trial court.

J.C. McLIN, JUDGE